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APPENDIX A

FINDINGS OF FACT AND OPINION OF THE DISTRICT OF COLUMBIA TAX COURT (FILED DECEMBER 22, 1965, DOCKET NO. 1969)

[Captions omitted]

FINDINGS OF FACT AND OPINION

The assessing authority of the District of Columbia assessed the petitioner a deficiency in income tax from which he here appeals on the grounds (a) that it is statutorily invalid, and (b) that it is unconstitutional. The respondent claims that the assessment was proper.

Findings of Fact

1. The petitioner is a domiciliary of the District of Columbia, residing at 4000 Tunlaw Road, Northwest.

2. (a) Up to and including March 31, 1963, the petitioner was a domiciliary of Michigan, residing in the City of Detroit, and as such he paid an intangible personal property tax to Michigan in the amount of $26.71, and an income tax to the City of Detroit in the amount of $45.41, or a total of $72.12.

(b) During the above three month period the petitioner's income was $5,142.42.

3. On April 1, 1963, the petitioner came to the District of Columbia and established his residence here, and has since that date been domiciled in the District.

4. The petitioner filed with the assessing authority of the District an income tax return for the period from April 1 to December 31, 1963, in which he reported adjusted gross

income of $17,178.04; and, after deductions prorated for the nine months period, took credit for income taxes withheld in the amount of $357.29, and paid to the District an additional income tax of $109.83.

5. (a) The assessing authority on March 12, 1965, determined that the petitioner was liable for an income tax on the entire net income received by him during the year 1963, and assessed the petitioner a deficiency in income tax in the amount of $125.18, plus interest in the amount of $6.88 or a total of $132.06.

(b) The above mentioned deficiency was computed as follows:

Adjusted gross income shown on return		$17,178.04
Plus income not reported on D. C. return[1]		5,142.42
Total		$22,320.46
Less:		
Standard deduction	$1,000	
Exemption	1,000	2,000.00
Revised taxable income		$20,320.46
Revised tax liability		$664.42
Less:		
Tax withheld	$357.29	
Domiciliary State Credit		
Michigan intangible personal property tax	26.71	
Detroit income tax	45.41	72.12
Amount paid with return	109.83	539.24
Net amount of income tax due		$125.18

(c) The petitioner paid the aforesaid deficiency on March 15, 1965.

6. The case was filed on June 4, 1965.

[1] Income received from January 1 to March 31, 1963.

Opinion

The petitioner became domiciled in the District of Columbia on April 1, 1963, and has remained so since that date. Before coming to Washington he was domiciled in Detroit. For the period from January 1 to March 31, 1963, he paid the State of Michigan an intangible personal property tax in the amount of $26.71, and the City of Detroit an income tax of $45.41 upon the income he had received during that period.

The petitioner filed an income tax return for the period from April 1 to December 31, 1963, in which he reported as taxable merely the income which he had received for that nine months period, and paid an income tax of $109.83, which was in addition to income taxes withheld in the amount of $357.29.

The assessing authority of the District determined that the petitioner was liable for an income tax on his entire income received during the year 1963, and accordingly assessed a deficiency in the amount of $125.18, after giving him credit for the above mentioned intangible personal property tax paid the State of Michigan, and the income tax paid the City of Detroit. From such assessment the petitioner here appeals on two grounds, namely, that the assessment is not justified under the District of Columbia Income and Franchise Tax Act of 1947; and that it is violative of the Fifth Amendment to the Constitution.

The petitioner, acting *pro se*, has furnished the Court an excellent and exhaustive brief which has given the Court a great deal of thought and pause. It is worthy of the consideration, which the Court has given it.

Liability Under the Statute

The Court is of the opinion that by terms of the District of Columbia Income and Franchise Tax Act of 1947, Chapter 15 of Title 47, District of Columbia Code, 1961 Edition, the

assessment of which the petitioner here complains was as provided for in, or in conformity therewith. Section 4(s) of Title I of the Act, Section 47-1551c(s) of the Code, provides that the term "resident" includes every individual domiciled within the District on the last day of the taxable year, * * *"; and Section 1 of Title VI of the Act, Section 47-1567 of the Code, is as follows:

> "For the purposes of this article,[2] and unless otherwise required by the context, the words 'taxable income' mean the *entire net income of every resident,* in excess of the personal exemptions and credits for dependents allowed by section 2 of this title and that portion of the entire net income of every non-resident which is subject to tax under title VIII[3] of this article." *(Emphasis supplied.)*

Also that portion of Section 1 of Title X of the Income and Franchise Tax Act, Section 47-1580 of the Code, which is in the language following:

> "It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident * * *." *(Emphasis supplied)*

The above conclusion is fortified by Section 5 of Title VI, Section 47-1567d of the Code, which provides:

> "The amount of tax payable under this title by an individual who, although a resident of the District of Columbia as defined in this article, was nevertheless a bona fide domiciliary of any State or Territory of the United States or political subdivision thereof during the taxable year shall be reduced by the amount required to be paid by such individual as income or intangible personal property taxes, or both, for such taxable year to the State,

[2] The article which levies the income tax on residents.
[3] The title relating to unincorporated businesses.

Territory or political subdivision thereof of which he was a domiciliary. * * *."

In 1963 the Court decided *Kaiser* v. *District of Columbia*, 91 W. L. R. 991, C. C. H. - D.C. Reports, paragraph 200-027, page 10,097, in which it held that the taxpayer who was domiciled nine months of the taxable year in New Jersey, but domiciled in the District of Columbia on the last day of the taxable year was liable for an income tax on her *entire* income for that year. Such decision was based upon the plain language of Section 1 of Title VI of the Income and Franchise Tax Act (Section 47-1567 of the Code) quoted above; and upon the decision of the Maryland Court of Appeals in *Wood* v. *Tawes*, 181 Md. 155, 28 A.2d 850, cert. den. 318 U. S. 788, which interpreted a provision in the Maryland law similar to the District of Columbia Statute concerning the liability of an individual who becomes domiciled in the taxing jurisdiction during the taxable year and remains so on the last day thereof.

The Court considered *Kennedy* v. *Commissioner of Taxation*, 256 Mass. 426, 152 N. E. 747, which held, or seemed to hold, upon a somewhat strained interpretation of the Massachusetts law, that the word "resident" was descriptive of the income subject to tax and not of the person subject to tax; and *Greene* v. *Tax Commission*, 221 Wis. 531, 266 N. W. 270; *Martin* v. *Gage*, 281 Ky. 95, 134 S. W. 2d 966; and *Forester* v. *Culpepper*, 194 Ga. 74, 22 S. E. 2d 595. While the Court was aware that those cases supported the contention of Mrs. Kaiser, the taxpayer, and that they outnumbered those holding a contrary view, it could not interpret the plain language of the District of Columbia statute to mean anything else than if an individual is domiciled in the District on the last day of the taxable year, he is liable for an income tax on his entire taxable income for that year.

The Court, without considering *at this point* the constitutional question, adheres to its ruling in the *Kaiser* case that

the plain language of the statute requires the assessment of an income tax on the entire net income of an individual who becomes domiciled in the District during the taxable year, although *John C. Lee, et al.* 6 B. T. A. 1005, gives the Court some pause. In that case Judge Phillips held that an alien who became a resident in the United States during the taxable year was not liable for an income tax on the income earned by him in a foreign country before he became a resident in the United States. A study of that decision shows that the statutory provisions upon which Judge Phillips relied are substantially different from the pertinent provisions of the District's law. There was nothing in the Federal law similar to the provisions of Section 1 of Title VI and Section 1 of Title X of the Income and Franchise Tax Act quoted above.

Constitutional Question

The Court in the *Kaiser* case did not undertake to decide the question whether the imposition of the income tax assessed against Mrs. Kaiser was unconstitutional, as stated in the excerpt from the opinion in that case following:

> "As observed above, the Court will not undertake to decide the constitutional question presented. It attempts merely to interpret the language of the taxing law. The matter of the Court's status has in several cases been the subject of review by the United States Court of Appeals, which has consistently refrained from deciding the question. It is hoped that some day that Court will decide the matter and dissipate the doubt surrounding it."

The petitioner's brief has led the Court to a further consideration of the matter of its status, and to the conclusion that it should decide the constitutional question herein posed. It would seem appropriate to discuss the reasons for that conclusion.

According to the opinion of Judge Prettyman in *Watrous* v. *District of Columbia,* 77 U. S. App. D. C. 295, 135 F. 2d 654, the Board of Tax Appeals of the District was not a court, but an administrative agency, that is to say, was *"a constituent member of the assessing authority."* This is what he held:

> "* * *. In these cases cited by the District, the court in which the taxpayer seeks relief from over-assessment is not in direct current of the assessing authority. In the District of Columbia, however, the Board of Tax Appeals is made, by statute *a constituent member of the assessing authority. It is not a court.* * * *." (Emphasis supplied.)*

Later in *Hamilton National Bank* v. *District of Columbia,* 81 U.S.App.D.C. 200, 156 F. 2d 843, Judge Prettyman said:

> "But our relation to the Board of Tax Appeals of the District of Columbia is more flexible than the relationship of the Supreme Court to the courts of the several states, and permits of directives as well as the usual appellate dispositions. The Board is *'a constituent member of the assessing authority* * * *'" (Emphasis supplied.)*

To overcome Judge Prettyman's ruling in the above two cases there was introduced in Congress Public Law 493 of the 82nd. Congress, which was approved on July 10, 1952.[4] When the bill came before the House of Representatives its manager, Representative Smith, in explaining it before the vote on it by the members of the House, among other statements, said:

> "The fact is that the Board of Tax Appeals *is really a court* which decides the rights as between the District Commissioners and the citizen in the

[4] The bill was proposed or promoted by the Bar Association of the District of Columbia, acting through its Committee on Taxation.

matter of payment of his taxes." *(Emphasis supplied.)* * * *

"So the Committee has devised an amendment which is printed in the bill, which would set up the Board of Tax Appeals *as a court*, as an independent body independent of the District Commissioners who are a party to all litigation that comes before the Court." *(Emphasis supplied.)*

At the same time Representative O'Hara offered an amendment increasing the salary of the Judge of the Tax Court from $8,000 to $13,000, stating that it was suggested by the Bar Association as being the salary of the Judges of the then Municipal Court. Representative Smith accepted the amendment with the observation following:

"It seems to me a *court* of this much importance should be entitled to at least the salary of the judge of the court of least rank, that is a municipal court judge." *(Emphasis supplied.)*

What possible doubt there is as to the intention of Congress, if any, is dissipated by a reading of that portion of Section 5 of the Act of July 10, 1952, Public Law 493, 82nd. Congress, which added two paragraphs to Section 2 of Title IX of the District of Columbia Revenue Act of 1937 (the organic law of the Board of Tax Appeals). The first of those paragraphs reads as follows:

"The Board of Tax Appeals for the District of Columbia shall hereafter be known as the District of Columbia Tax Court and the member thereof shall be known as the Judge of the District of Columbia Tax Court. *The said District of Columbia Tax Court shall not be deemed or held to be a constituent member of the assessing or taxing authority*[5] of the District of Columbia but shall be

[5] The negative of the exact wording in the opinion in the *Watrous* and *Hamilton National Bank* cases.

> deemed to be an independent agency, separate and apart from such assessing and taxing authority." *(Emphasis supplied.)*

It is clear from the use of the negative of the exact words of Judge Prettyman in the *Watrous* and *Hamilton National Bank* cases that Congress intended to take from the Tax Court the administrative function or character which it was said to have in those two cases, and to make it a court, and to remove any doubt about its status or character. The use of words "an independent agency", however, was unfortunate, and has caused, apparently, confusion which by no means has been dissolved. In *District of Columbia* v. *Washington Post*, 98 U. S. App. D. C. 304, 235 F. 2d 531, 83 W. L. R. 1236, one of the questions seriously presented was whether the Tax Court had the authority to order the taking of depositions without the District of Columbia, in other words, whether it was a court. The decision of this Court based almost entirely on the evidence adduced by depositions was affirmed by the United States Court of Appeals. Unfortunately, that Court did not specifically refer to the question involved as to the authority of this Court in the matter of depositions and which was presented and argued by the litigants. Resort to inference, however, leads to the conclusion that the Court of Appeals believed the Tax Court was a court. In a later case, however, namely, *District of Columbia* v. *Brady*, 109 U. S. App. D. C. 324, 288 F. 2d. 108, we find in the opinion of Judge Bastian the following:

> "Moreover, under the Code, the ultimate exhaustion of *the administrative remedy*, i.e. a decision of the Tax Court, an 'independent agency' in the District Government, or indeed even the filing of an appeal with that Court, precludes the taxpayer from filing suit under his common-law remedy." *(Emphasis supplied.)*

Later, on June 4, 1964, *Pepsi-Cola Bottling Co.* v. *District of Columbia,* 119 U. S. App. D. C. 73, 337 F. 2d 109, 92 W. L. R. 1089, was decided. In Foot-note 3 to the opinion by Judge McGowan is found the following:

> " * * *. The Tax Court is, it seems clear, *an integral part of the machinery provided for the assurance of rational assessments of taxes* in the District of Columbia, and it does not function like, or under the same rules as, a court of general jurisdiction adjudicating a lawsuit to recover money paid. Indeed, in a case such as this, it would appear to be true that legal doctrines developed by courts of general jurisdiction in tax cases, such, for example, as the principal that assessments will not be invalidated by reason of error of judgment, bear little, if any, relation to the job the Tax Court has been given to do." *(Emphasis supplied.)*

In the performance of its duties, especially in relation to constitutional questions, this Court is confused that in the above quoted portion of Foot-note 3 of the *Pepsi-Cola case,* there is stated in different language the characterization of the Tax Court and the limitation of its function exactly similar to that stated by Judge Prettyman in the *Watrous* and *Hamilton National Bank* cases, notwithstanding that Congress in enacting the Act of July 10, 1952, emasculated the rulings in those cases. Were it not for the rulings in the *Brady* and *Pepsi-Cola Bottling Co.* cases the Court would hold that it does "function like, or under the same rules as a court of general jurisdiction" limited, of course, to the field of taxation. As it is, the Court has some doubts as to its status. This situation, however, should not in the opinion of the Court prevent it from deciding the constitutional question here presented. The District of Columbia Tax Court is modeled after the structure of the Tax Court of the United States, although it should be observed that by the terms of the latter's organic act it is specifically desig-

nated an administrative agency.[6] As such it can and does assess taxes, while as to the District of Columbia Tax Court Congress has specifically taken away any administrative function, if any, it had as the Board of Tax Appeals. It cannot assess a tax.

At any rate, the Tax Court of the United States has repeatedly undertaken to decide constitutional questions, and without objection or criticism by the appellate courts to which its decisions on constitutional questions were appealed. See the numerous cases digested in Section 4 of the subject "Statutory Construction" Tax Court Digest and 1965 Pocket Supplement, published by Bobbs-Merrill Company, Inc., and the more recent cases, *Estate of Harris Fahnestock,* 2 T. C. 756, 759; *General Analine & Film Corp.,* 3 T. C. 1070, 1076; *Estate of Louis Solowey,* 15 T. C. 188, 190. Also Section 50. 19, Vol. 9, p. 215, *Mertens Law of Federal Income Taxation,* which states that "The jurisdiction of the Board to pass upon constitutional questions, although questioned at one time, has become firmly established." (Citing numerous cases.)

The Court is not unmindful of the principle of statutory construction that a statute must be construed, if possible, so as to avoid any doubt as to its constitutional validity. *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 60 L. Ed. 1061, 36 S. Ct. 658; *Carry* v. *South Dakota,* 250 U.S. 118, 122, 63 L. Ed. 886, 39 S. Ct. 403; but the language of Section 1 of Title VI and Section 1 of Title X of the Income and Franchise Tax Act (Sections 47-1567 and 47-1580, D. C. Code) is so clear that the only proper conclusion is that *under the statute* the petitioner is liable for an income tax on his *entire* income for the taxable year, regardless of the fact that a portion was earned or received before he became domiciled in the District of Columbia. The Court, therefore, should

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[6] There has been a movement for many years to make the Tax Court of the United States a court, which it really is.

not decline to pass on the constitutional question, 16 C. J. S. 319, 320 and 321, *Constitutional Law*, par. 94.

If, as the petitioner claims, the assessment of an income tax on his income earned before he came to the District is invalid, it must be under the due process clause of the Fifth Amendment. *Wright* v. *Davidson*, 181 U. S. 371, 384, 45 L. Ed. 900, 21 S. Ct. 616, 621; *Moses* v. *United States*, 16 App. D. C. 428, 434, 50 L. R. A. 532; *Neild* v. *District of Columbia*, 71 App. D. C. 306, 316, 317, 110 F.2d 246. While the Fourteenth Amendment is not applicable to the District of Columbia,[7] the Fifth Amendment does so apply.

There can be no question that a state and the District of Columbia can constitutionally impose an income tax on a resident based upon or measured by his entire income, even if part thereof is received or earned without the state or the District. That is so because the state or the District has jurisdiction of the *person* of the taxpayer. It is recognized that a state or the District of Columbia has the constitutional power to impose an income tax when it has jurisdiction of either the person or the income of the taxpayer. But the situation is quite different in respect of income earned when the taxing state or the District has no jurisdiction of either the person or the income. That is the situation here in respect of the income earned by the petitioner before he came to the District. The assessing authority assessed an income tax upon the income earned by the petitioner without the District and while he was neither a resident nor a domiciliary thereof. The Court believes that under the due process clause of the Fifth Amendment such action was without the power of Congress as the legislature for the District to impose the tax; and that since such action was called for in Section 1 of Title VI and Section 1

[7] The ruling in *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693, cited by petitioner, may appear to be contrary, but the ruling was to avoid a constitutional hurdle in a school discrimination case, and apparently was quite limited to such cases. It was held the discrimination was violative of "due process".

of Title X of the District of Columbia Income and Franchise Tax Act of 1947 (Section 47-1567 and 47-1580 of the Code) are violative of the Fifth Amendment in so far as the situation or status of the taxpayer and assessment of the income tax on his income earned from January 1 to March 31, 1963, are concerned.

Since the due process clause of the Fifth Amendment does apply to the District of Columbia, the decisions of the Federal and State Courts involving the due process clause of the Fourteenth Amendment are helpful in the solution of the constitutional question here presented. In *Shaffer* v. *Carter*, 252 U. S. 37, 64 L. Ed. 445, 48 S. Ct. 221, Mr. Justice Pitney made the observation following:

> "And, as far as the question of jurisdiction is concerned, the due process clause of the Fourteenth Amendment imposes no greater restriction in this regard upon the several States than the corresponding clause of the Fifth Amendment imposes upon the United States."

In *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U.S. 628, 38 L. Ed. 846, 14 S. Ct. 952, it was held "that the power of the state, even in its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *CF. Wallace* v. *Hines*, 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435, and *The City of St. Louis* v. *The Wiggins Perry Co.*, 11 *Wallace* 423, 20 L. Ed. 192. Also *Green* v. *Wisconsin Tax Commission*, 221 Wisc. 531, 266 N. W. 274; *Martin* v. *Gage*, 281 Ky. 95, 134 S. W. 966. In the famous case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, there is found on page 319 this language:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

In respect of, or in connection with the income of the petitioner earned by him without the District of Columbia from January 1 to March 31, 1963, the District did not have jurisdiction of either the person or the income of the petitioner.

There is nothing in *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246, or in *Mercury Press* v. *District of Columbia,* 84 U. S. App. D. C. 203, 173 F. 2d 636 (cert. den. 337 U. S. 931) that would deny the conclusion drawn herein by the Court. In the first case the taxpayers unsuccessfully invoked the commerce clause, and equal protection clause of the Fourteenth Amendment in a case involving commerce between the District and areas outside and retroactivity. The second mentioned involved the propriety of the taxation by the District of newsprint paper in its original package. The constitutional question here presented, is one of first impression.

While in the *Neild* case it was held that "when it legislates for the District, Congress acts as a legislature of national character", the opinion does state that Congress in legislating for the District is subject to those prohibitions of the Constitution which act directly or by implication upon the Federal Government,[8] which includes, of course, the due process clause of the Fifth Amendment.

The conclusion of a note, JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICILE, 35 Harvard Law Review, page 876, after a discussion of the problem, is the following:

> "It appears thus that, regardless of the character of the tax its laws impose, the jurisdiction of the state of the new domicil to tax *income* is limited except in the rare case mentioned[9] either by the actual lack of jurisdiction or the prohibition on its exercise placed by the Fourteenth Amendment, to

[8] 71 App. D. C. page 310.
[9] Not similar to the present case.

> the levy of a tax on or with respect to only so much of the total income as was *acquired after acquisition of the new domicil.*" *(Emphasis supplied.)*

The fact that Section 5 of Title VI of the Income and Franchise Tax Act, Section 47-1567d(a) of the Code, gave a credit against the 1963 District income tax for the income tax paid by the petitioner to his former domicil on the income which he earned from January 1 to March 31, 1963, does not negative or affect the conclusion herein reached. Even if the credit had equaled or exceeded the deficiency, which it did not, the due process clause of the Fifth Amendment did not permit the taxation by the District of income earned in a period during which it had no jurisdiction of either the person or the income of the petitioner.

Conclusion

For the reasons stated the Court holds that a deficiency in income tax for the calendar year, 1963, in the amount of $125.18, was erroneously assessed against, and collected from the petitioner; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from March 15, 1965, to the date of the payment of the refund.

Decision will be entered for petitioner.

s/ Jo. V. Morgan
Jo. V. Morgan
Judge

APPENDIX B

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Captions omitted]

OPINION RENDERED JANUARY 5, 1967

Before DANAHER, *Circuit Judge*, EDWARDS,* *Circuit Judge* of the United States Court of Appeals for the Sixth Circuit, and TAMM, *Circuit Judge*.

I

TAMM, *Circuit Judge:* This is a proceeding to review a decision of the District of Columbia Tax Court presenting questions relating to the interpretation of the District of Columbia Income and Franchise Tax Act of 1947, as amended, 61 Stat. 328, as it applies to a taxpayer who was domiciled and earned income in another jurisdiction for part of the taxable year prior to becoming domiciled in the District of Columbia for the remainder of the taxable year. The tax year in question is 1963. Respondent was a domiciliary of Detroit, Michigan until April 1, 1963, at which time he moved to the District of Columbia. For the rest of 1963 and since that time he has been a domiciliary of the District. Respondent filed with the District an individual income tax return for the period from April 1, to December 31, 1963, reporting therein adjusted gross income for that nine-month period of $17,178.04, from which he took certain deductions prorated for the nine-

* Sitting by designation pursuant to Section 291(a), Title 28 U.S. Code.

month period reflected on his return. Respondent earned $5,142.42 for the three months of 1963 during which he was domiciled in Detroit. He paid to the State of Michigan an intangible personal property tax of $26.71 for this The new assessment resulted in a revised tax of $664.42 period and an income tax to the City of Detroit of $45.41, for a total of $72.12. Respondent did not include any of the income earned by him prior to April 1, 1963 in his District of Columbia return for 1963, nor did he claim any credit for the taxes he paid in Michigan during the three-month period. Respondent computed his tax to the District for the nine-month period at $467.12 which he duly paid.

Subsequently the District Finance Office assessed a deficiency in respondent's tax, finding that he should have computed his District tax on the basis of his income for the *entire year*, rather than for only the nine-month period. (before credits), making a deficiency in tax of $197.30. The Finance Office then allowed a credit of $72.12 for the Michigan and Detroit taxes (which credit respondent had not previously claimed), making a net deficiency of $125.18, which respondent thereafter paid under protest (together with interest).

Respondent subsequently filed a petition with the District of Columbia Tax Court, seeking a refund of the deficiency assessed. The Tax Court reversed the determination of the Finance Office and ordered a refund (with interest) to respondent. The District of Columbia has petitioned this court to reverse the determination of the Tax Court. We affirm that decision, although on a somewhat different ground than that adopted by the Tax Court.

Before both the Tax Court and us, respondent has argued that as a matter of statutory construction, the District of Columbia Income and Franchise Tax Act of 1947, as amended, does not tax income received by a taxpayer prior

to his residence in the District. Alternatively, respondent has argued that if the Act is interpreted to tax this income, that portion upon which the District relies is unconstitutional since it taxes income beyond the jurisdiction of the District of Columbia and is, consequently, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Tax Court rejected respondent's statutory interpretation argument, finding that the Act in question, literally interpreted, imposed a tax upon respondent's entire income for the taxable year 1963. However, the Tax Court held that to the extent the statute included as taxable the income earned by respondent prior to the time he became a resident and domiciliary of the District, it violated the Fifth Amendment.

II.

As is clear from the decision of the Tax Court, respondent has placed in issue in this case a question of grave constitutional significance. The Tax Court considered and decided the constitutional question, while at the same time refusing to hold the tax invalid as a matter of statutory construction. We believe that the sage words of Mr. Justice Holmes in *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) have relevance for the resolution of the problem which we are confronted with in this case. He stated there that

> "a statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553 (1965) where the Supreme Court recently construed other sections of the same Act as is involved here so as to avoid the necessity of reaching constitutional ques-

tions. Moreover, it is a cardinal principle of statutory construction that if there are two possible interpretations of a statute, one which would raise a question of constitutionality, and another which would not, then the construction which fairly avoids the constitutional question must be adopted. *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961).

Applying these general principles to this particular case, we believe, contrary to the Tax Court, that *as a matter of statutory construction* the income tax law involved here does not tax income received by a taxpayer prior to his becoming a "resident" of the District. While the Tax Court's determination of the constitutional question has much to recommend itself as both a logical and legal matter, we believe that the statute admits more readily of an interpretation that it was not intended to reach the income here in question, and we thus place our decision upon the nonconstitutional grounds.

III.

Respondent has set forth his statutory construction argument in a clear and succinct manner in his brief, and rather than attempt to paraphrase his excellent exposition, it is set forth here in its entirety:[1]

> "There is no specific provision in the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code, §§ 47-1551 et. seq.) authorizing the taxation of income earned or receive by individuals prior to their residence in the District. The tax law provides that a person domiciled in the District on the last day of the year shall be considered a resident of the District (Section 4(s) of Title 1; Code Sec. 47-1551c(s)). There is no dispute as to the respondent having been both a resident and domici-

[1] The text of the relevant sections of the statute is set out *infra* as an appendix to facilitate understanding of this argument.

liary within the District at all times since April 1, 1963. However, Section 4(s) of Title I (Sec. 47-1551c(s) of the Code) does not purport to tax income earned prior to domicile or residence in the District.

"The section actually imposing the tax states that there is levied for each year 'upon the *taxable* income of every resident' a tax at specified rates (Section 3 Of Title VI; Code Sec. 47-1567b; underscoring added). The phrase 'taxable income' is defined to mean the 'entire net income of every resident, in excess of the personal exemptions and credits for dependents' (Section 1 of Title VI; Code Sec. 47-1567). This language necessarily implies that the income must be taxable. It will be noted that the tax is not by its terms imposed on income for the 'entire' or 'whole' year, but merely for the 'taxable year.' It is therefore necessary to analyze the Act to consider the meaning of 'taxable year.'

"The tax law expressly recognizes that the status of a taxpayer may change during the taxable year, and in those situations the law provides an apportionment of the personal exemptions and credit for dependents (Section 2 of Title VI, Code Sec. 47-1567a). Subsections (d) and (e) of the Section specifically provide for proration of exemptions and credits for dependents and for changes in marital status, or with respect to persons dying before the end of the year, respectively. Subsection (f) of the same section makes a more general provision covering the case of a return 'made for a fractional part of a taxable year.' The phrase 'taxable year' is specifically defined elsewhere in the law to include a 'return made for a *fractional part* of a calendar or fiscal year' (Section 4(k) of Title I; Code Sec. 47-1551c(k); underscoring added.)

"Subsection (f) of Section 2 of Title VI (Code Sec. 47-1567a) would appear to be clearly applicable to respondent's situation and in filing the return for the last nine months of 1963, claim was

made for personal exemption only as to ¾ of the full amount, or $750 (J.A. 13). Subsections (d) and (e) cover changes in marital status, and the death of the taxpayer, respectively. Subsection (f) is broader in its language and not limited to the special situations covered by Subsections (d) and (e). Hence it appears clearly to cover such a situation as respondent's so as to authorize the filing of a return for a fractional part of a year.

"Since a return is authorized for a fractional part' of a year, that part of a year becomes the 'taxable year' within the meaning of Section 3 of Title VI (Code Sec. 47-1567b). So construed, the phrase 'taxable income' in the same section reaches only the income received from the *'resident'* after he becomes such. Similarly, the phrase 'taxable year' in the credit provision (Section 5(a) of Title VI; Code Sec. 47-1567) is properly interpreted to be the 'fractional part of the year in which the taxpayer resided in the District.'" Br. for respondent, pp. 22-25.

We have given close scrutiny and study to respondent's statutory construction approach and are persuaded by it. We agree with respondent that construing the sections in question in the manner suggested comports more properly with accepted principles of jurisdiction and avoids the necessity of inquiring into the constitutional question. The question remains, however, as to whether the result suggested by respondent is that intended by Congress.

We have examined the legislative history (or lack thereof) relating to this statute, the decisional law and statutes from other jurisdictions, and the treatment of the question by federal taxing authorities in analogous contests. We believe that our conclusion here is in conformity with the resolution of the question by these other authorities, as will be demonstrated by a brief review of them.

a.) *Legislative history:* The Congressional committee reports concerning the present District of Columbia Income Tax Law, which was enacted in 1947, contain no specific provisions concerning this problem. The situation is the same with respect to the predecessor District Income Tax Law, enacted in 1939. However, the House Committee Report concerning the 1939 Law contains the following language:

> "accounting periods, basis of returns, and other provisions relating to returns of the taxpayer are substantially the same as the Federal law relating to such subjects." H.R. No. 808, 76th Cong., 1st Sess., p. 4.

b.) *Federal tax authority:* Respondent has directed the court's attention to the case of *Lee* v. *Commissioner,* 6 B.T.A. 1005, a 1927 decision of the Board of Tax Appeals holding that the Federal income tax was not applicable to income earned by a nonresident alien prior to the time of becoming a resident of the United States. In *Lee* the taxpayer had lived part of the tax year in England and part in the United States. In holding for the petitioner-taxpayer the Board stated that "taxing statutes should not be extended beyond their clear import." (6 B.T.A. at 1006.) This holding of the Board was approved by a subsequent Treasury Decision, which set forth a General Counsel's Memorandum issued in 1932 (2 Cum. Bull. 99, GCM No. 10759). The *Lee* case, with its subsequent acceptance by the Treasury, is persuasive support for respondent's argument, particularly in view of the close affinity between the District of Columbia law and the Federal taxing statute.

c.) *Statutes and state decisional law:* Respondent has cumulated an impressive array of statutes from various states demonstrating clearly that these states do not attempt to tax income received prior to residence in the

state.[2] In addition, numerous state courts have considered the question here involved under statutes not unlike the District law and have concluded that the various state legislatures did not intend to tax income earned in another state prior to domicile in the taxing state. *E.g., Greene* v. *Wisconsin Tax Comm'n.*, 221 Wisc. 531, 266 N.W. 270 (1936); *Kennedy* v. *Commissioner*, 256 Mass 426, 152 N.E. 747 (1926); *Martin* v. *Gage*, 281 Ky. 95, 134 S.W.2d 966, 126 A.L.R. 449 (1939); *Forester* v. *Culpepper*, 194 Ga. 744, 22 S.E.2d 595 (1942). Perhaps the best statement in these cases of the conclusion reached by these courts that the statues involved did not cover income received prior to residence in the state is that found in *Kennedy, supra*, wherein the court stated that this construction of the law

> "avoids highly difficult constitutional questions which would be encountered if the section were interpreted to subject a person removing to the Commonwealth in the latter part of any year to taxation on income received in a foreign jurisdiction while an inhabitant thereof, and thus at a time when such person derived no protection from our laws and owed them no duty." 152 N.E., at 749.

For all of the foregoing reasons, therefore, the decision of the District of Columbia Tax Court will be *affirmed.*

Appendix

District of Columbia Income and Franchise Tax Act of 1947, as amended, 61 Stat. 328, ch. 258:

Title I, Sec. 4(k)(s), (t), D.C. Code, 1961, Sec. 47-1551c(k)(s)(t).

"Sec. 4. *General Definitions.*—For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

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[2] *E.g.*, Ark. Stats., § 84-2003 (a); New Mexico Stats., § 72-15-3.1; New York Tax Law § 367-a; No. Car. Gen. Stats., Ch. 105, § 105-132 (13) as amended; Va. Code, § 58-77, par. (10).

"(k) The words 'taxable year' mean the calendar year or the fiscal year, upon the basis of which the net income of the taxpayer is computed under this subchapter; if nofiscal year has been established by the taxpayer, they mean the calendar year. The phrase 'taxable year' includes, in the case of a return made for a fractional part of a calendar or fiscal year under the provisions of this Commissions, the period for which such return is made: Provided, however, That no taxpayer may change from a calendar year to a fiscal year or from a fiscal year to a calendar year within any taxable year without the written permission of the Assessor."

• • •

"(s) The word 'resident' means every individual domiciled within the District on the last day of the taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. The word 'resident' shall not include any elective officer of the Government of the United States or any employee on the staff of an elected officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, or any officer of the executive branch of such Government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, unless such officers are domiciled within the District on the last day of the taxable year."

"(t) The word 'nonresident' means every individual other than a resident."

Title III, Sec. 2(a), D.C. Code, 1961, Sec 47-1557(a).

"Sec. 2. *Gross Income and Exclusions Therefrom.*—(a) The words 'gross income' include gains

profits, and income derived from salaries, wages,or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

Title V, Sec. 2 (a), D.C. Code, 1961, Sec. 47-1564(a).

"Sec. 2. *Requirement.*—Each of the following persons shall file a return with the Assessor stating specifically the items of his gross income and the items claimed as deductions and credits allowed under this article, and such other information for the purpose of carrying out the provisions of this article as the Assessor may require:

"(a) *Residents and Nonresidents.*—Every nonresident of the District receiving income subject to tax under this article and every resident of the District, except fiduciaries, when— * * *".

Title VI, Secs. 1, 2(d), (e) and (f); D. C. Code, 1961, Secs. 47-1567a(d), (e) and (f).

"Sec. 1. *Definition.*—For the purposes of this article, and unless otherwise required by the context, the words 'taxable income' mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 2 of this title and that portion of the entire net income of every nonresident which is subject to tax under title VIII of this article."

* * *

2. "(d) If the status of a taxpayer changes during the taxable year with respect to his marital

status the amount allowed under subsection (b) of this section shall be apportioned in accordance with the number of months before and after such change. For the purposes of this subsection, a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

"(e) Beginning with the first taxable year to which this article is applicable and in succeeding taxable years, the amounts allowed under subsections (a), (b), and (c) of this section shall be prorated to the day of death in the final return of a decedent dying before the end of the taxable year, and as of the date of death the personal exemption is terminated and not extended over the remainder of the taxable year.

"(f) In the case of a return made for a fractional part of a taxable year, the personal exemptions and credits for dependents shall be reduced, respectively, to amounts which bear the same ratio to the full credits provided as the number of months in the period for which the return is made bear to twelve months."

Title VI, Secs. 3, 5, D.C. Code, 1961, Secs. 47-1567b, 1580.

"(a) There is hereby annually levied and imposed for each taxable year upon the taxable income of every resident a tax at the following rates: . . ."

"(b) In lieu of the method of computation prescribed by subsection (a), a resident reporting on a cash basis for any full calendar year who does not claim credit for taxes paid by him to any State or Territory of the United States or political subdivision thereof under the provisions of section 47-1567d on the whole or any part of his income for such calendar year and, if his gross income for such calendar year is $5,000 or less, and is derived solely from salaries, wages, dividends, and interest, may elect to pay the tax in accordance with a table to be included in regulations."

"Sec. 5. (a) *Credit Against Tax Allowed Residents.*—The amount of tax payable under this title by an individual who, although a resident of the District of Columbia as defined in this article, was nevertheless a bona fide domiciliary of any State or Territory of the United States or political subdivision thereof during the taxable year shall be reduced by the amount required to be paid by such individual as income or intangible personal property taxes, or both, for such taxable year to the State, Territory, or political subdivision thereof of which he was a domiciliary. The Assessor may require proof, satisfactory to him, of the payment of such income or intangible personal property taxes: *Provided, however,* That the credit provided for by this section shall not be allowed against any tax imposed under title VIII of this article."

Title X, Sec. 1, D.C. Code, 1961, Sec. 47-1580.

"Sec. 1. *Purpose of Article.*—It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District; *Provided, however,* That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the Dis-

trict: *Provided further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, section 2(b) (13) of this article."

JUDGMENT FILED JANUARY 5, 1967

On Petition for Review of a Decision of the District of Columbia Tax Court.

Before: Danaher, Circuit Judge, Edwards, Circuit Judge of the United States Court of Appeals for the Sixth Circuit,* and Tamm, Circuit Judge.

JUDGMENT

This case came on to be heard on the record from the District of Columbia Tax Court, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision of the District of Columbia Tax Court on review in this case is affirmed, with costs.

Per Circuit Judge Tamm.

Dated: January 5, 1967

* Sitting by designation pursuant to Section 291(a), Title 28, U. S. Code.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved

Amendments to the Constitution of the United States:

Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended.*
Title IV, Secs. 1, 2, & 3; D. C. Code, 1961, Secs. 47-1561, 47-1561a and b.

"Sec. 1. *Accounting Periods.*—The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of acounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Assessor does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section (4) (j) of title I or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. If the taxpayer makes a Federal income-tax return, his income shall be computed, for the purposes of this title, on the basis of the same calendar or fiscal year as in such Federal income-tax return, if the basis is accepted and approved by the Commissioner of Internal Revenue.

"Sec. 2. *Period in Which Items of Gross Income Included.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer unless, under methods of accounting permitted under section 1, any such amounts are to be properly accounted for as of a different period. In the case of death of a taxpayer on the cash basis, no amount will be accrued on his final return; and on the ac-

* For additional provisions see Appendix to Opinion of United States Court of Appeals for the District of Columbia Circuit—Appendix B, pages 24a to 29a, inclusive.

crual basis, amounts (except amounts includible in computing a partner's net income) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death, but such amounts shall be included in the income of the persons receiving such amounts by inheritance or survivorship from the decedent.

"Sec. 3. *Period for Which Deductions and Credits Taken.*—The deductions and credits provided for in this article shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed unless, in order to clearly reflect the income, the deductions or credits should be taken as of a different period. In the case of death of a taxpayer on the cash basis, no amount will be allowed as a deduction which was accrued up to the date of the taxpayer's death; and on the accrual basis, no amount (except amounts includible in computing a partner's net income) accrued only by reason of the death of the taxpayer shall be included in computing net income for the period in which falls the date of the taxpayer's death but such amounts shall be deductible by the estate or other person who paid them or is liable for their payment."